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# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1957

**No. 303**

ALASKA INDUSTRIAL BOARD and CARL  
E. JENKINS,

*Petitioners,*

VS.

CHUGACH ELECTRIC ASSOCIATION, INC.,  
a corporation, and GENERAL ACCI-  
DENT, FIRE AND LIFE ASSURANCE COR-  
PORATION, LTD., a corporation,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit.

### PETITIONERS' REPLY BRIEF.

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## PETITIONERS' REPLY BRIEF.

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This is petitioners' short reply to the two principal arguments made by respondents in their answering brief.

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### 1. TEMPORARY DISABILITY COMPENSATION.

Respondents state that temporary disability terminates in two ways

“... either by return of earning capacity, or by resulting in permanent disability, either total or partial.”<sup>1</sup>

Petitioners have no quarrel with the first proposition; for if there is a return of earning capacity, there is no longer any temporary disability for which compensation should be paid. But petitioners cannot agree with the second hypothesis; it is the result of a gratuitous assumption made by respondents, unsupported by either logic or the unambiguous language of the statute.

Presumably, what is meant by “resulting in permanent disability” is the occurrence of an event whereby it is then apparent that the injured workman is entitled to a definite amount of money as compensation for permanent disability. An instance would be where a man (married and with one child) loses his arm—at the moment of injury, and not later by way of surgical amputation. Immediately he is entitled to the lump-sum, scheduled award of \$4,050.00 for partial permanent disability.<sup>2</sup> Under respondents’ theory there could be no payments for temporary disability, despite the fact that because of the type of injury incurred it might well be several months before this man could return to work and again earn a living. Here there would not even be a “termination” of temporary disability; for there was simply no such disability to begin with.

<sup>1</sup>Respondents’ brief, p. 11.

<sup>2</sup>Sec. 43-3-1 ACLA 1949. See petitioners’ opening brief, Appendix, pp. iii-iv.

Thus, respondents would have us believe that although there was a period of actual temporary disability during the time of healing, there was not, as a matter of law, any such disability at all. Realities must be ignored; facts are replaced by fiction. This, respondents say, is what the law requires.

But the statute<sup>3</sup> does not compel any such pretense; nor does it even suggest that facts should be ignored, to the detriment of the injured workman. It provides that "all injuries causing temporary disability" shall be compensated for by payments to the injured workman of 65% of his daily average wages. It does not provide that such compensation shall be paid only for those injuries which do not result in permanent disability. It provides that such compensation shall be paid "during the period of such disability." It does not limit the payments only to that portion of the period of disability preceding the finding of a certain degree of permanent injury.

In fact, the second sentence of the provision relating to temporary disability suggests that permanent and temporary disability payments can be payable at the same time, or at different times, regardless of the order in which liability for such payments is incurred by the employer. That sentence reads:

"And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary dis-

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<sup>3</sup>Sec. 43-3-1 ACLA 1949 [Temporary disability]. See petitioner's opening brief, Appendix, p. v.

ability, the amounts so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.”

The majority of the Court below has admitted that cases of permanent injury are “cases other than temporary disability”, within the meaning of this statute (R. 94). Thus, when an injury “develops or proves” to be permanent in nature, i.e., when that fact is established, the compensation for temporary disability “so paid or due” the injured workman shall be in addition to the compensation for permanent disability to which he shall be entitled.

The majority, however, has gone further and has added to the statutory language a word that is not there. They say that the words “so paid or due” should be modified by the word “therefore.” Thus, by what amounts to judicial legislation, the payments of temporary disability compensation are restricted to those which have become due prior to the award of a lump-sum payment for permanent disability.

There is nothing in the law which requires this result. The words “so paid” obviously refer to temporary disability compensation which has been paid prior to the award of compensation for permanent disability, or the determination that the injured workman is entitled to such an award. But the words “or due” certainly do not suggest that the payments of temporary disability compensation are restricted only to those which were due or which became due

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<sup>4</sup>Sec. 43-3-1 [Temporary disability], *supra*, note 3.

prior to the permanent disability determination or award. Temporary disability compensation is "due", or is owing to, a worker "during the period of" the temporary disability, and this must logically mean the entire period of such disability, and not merely a portion of such period.<sup>5</sup>

If this were a case where a mechanical reading of the law would create obvious incongruities and destroy the major purpose of the legislation, then there might be justification for avoiding this by reasonable judicial construction.<sup>6</sup> But here there is just the opposite case; incongruities are created and the principal objective of the statute is destroyed if the statutory language is not given its plain and ordinary meaning.<sup>7</sup> There is no reason why the Alaska Legislature could not provide for the payment of both types of compensation at the same time; there is nothing in such a legislative plan which goes beyond the scope of legislative powers. There is, then, no justification for distorting the language of the statute, or so limiting it under the guise of construction, as to defeat the manifest intent of the lawmaking body.<sup>8</sup>

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<sup>5</sup>In the light of the context and evident purpose of the statute, the word "due" should be construed in its larger or broader sense as signifying that which is owing, whether or not the time for payment has arrived. *United States v. State Bank*, 6 Pet. (31 US) 29, 36-37, 8 L ed 308, 310-311 (1832). In fact, this is the primary meaning of the word. *Rumely v. United States*, 293 F. 532, 548 (CA-2 1923).

<sup>6</sup>Cf. *Lawson v. Suwanee Fruit and Steamship Company*, 336 US 198, 201, 206, 93 L ed 611, 614-615, 617 (1949).

<sup>7</sup>See Petitioners' opening brief, pp. 20-24.

<sup>8</sup>See *United States v. Alpers*, 338 US 680, 681-682, 94 L ed 457, 460 (1950).

The difficulty here is that the court below was bothered with the abstract problem of how a man could be totally and permanently disabled and still have some remaining earning capacity which could be temporarily impaired. Since this appeared to involve a "contradiction in terms" (R 93), the decision was made that the legislature could not have meant what it said when provision was made for payment of both types of compensation.

But the Court was looking at the literal meaning of these words when taken out of context, and not at their specific meaning when read in conjunction with the broad purposes of the statute. Petitioners have shown in their opening brief (p. 18) that a man can be paid compensation for permanent and total disability even though his earning power, in truth and for practical purposes, has not been completely destroyed. If this can be the case, then logically it should be permissible to penetrate the fiction of "permanent and total disability", and accept the truth of actual remaining earning capacity. And this, then, leads to the acceptance of the further truth that an injury, separate and distinct from that which gave rise to the permanent and total disability award, can temporarily impair such remaining earning capacity. Thus, in a proper case sound reasoning requires the payment of temporary disability compensation after an award of total and permanent disability. Cf. *Smith v. Industrial Accident Commission*, 44 Cal. 2d 364, 282 P. 2d 64 (1955); *Asplund Construction Company v. State Industrial Commission*, 185 Okla. 171, 90 P. 2d

642 (1939); *Dennis v. Brown*, 93 So. 2d 584 (Fla. 1957); 20 NACCA Law Journal, pp. 88-91 (Nov. 1957).

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## 2. THE JURISDICTIONAL QUESTIONS.

Based upon facts appearing in the record, and under a reasonable interpretation of another provision of the Alaska Workmen's Compensation Act,<sup>9</sup> the Court below made the following determinations:

(a) Jenkins had made a "claim" for temporary disability compensation, within the meaning of "claim" as used in Section 43-3-4 ACLA 1949 (R. 88-90).

(b) Such claim was timely, by reason of being "presented within three (3) years after the injury", within the meaning of Section 43-3-4 ACLA 1949 (R. 88-90); and also by having been filed within two years after injury, within the requirement of Sec. 43-3-29 ACLA 1949 (R. 91).

(c) The Board's reviewing power, or continuing jurisdiction, under this section of the statute is not limited solely to the adjustment of the rate of compensation where there is a change of physical condition, but extends as well to the correction of errors of law in connection with an award previously made (R. 90).

(d) When the Board, on January 8, 1954, held that Jenkins was entitled to temporary disability com-

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<sup>9</sup>Sec. 43-3-4 ALCA 1949. Appendix, *infra*, p. i.

pensation (R. 52), and thus reversed its prior action of February 6, 1953 (R. 46-47), it neither reconsidered nor redetermined any factual questions. Its action was based simply upon a different view of the meaning of the statute. Hence, the fact that no appeal was taken by Jenkins within thirty days after the decision of February 6, 1953 did not make that decision "conclusive and binding",<sup>10</sup> and did not prevent the Board from later reconsidering the question of law presented there (R. 91).

These issues were in controversy in the Court below, and they were decided in a manner favorable to the contentions of petitioners. Hence, when petitioners filed their application for a writ of certiorari, they did not seek review of these issues, or what was referred to by the Court of Appeals as the "jurisdictional question" (R. 88). Their request was limited solely to a review of "the second principal question" presented on the appeal (R. 92).

If issues are in controversy in the Court below, then even in the absence of a cross-petition for a writ of certiorari they are available to a respondent as grounds for affirmance of the judgment of the Court of Appeals.<sup>11</sup> But respondents, without having filed any cross-petition, are not seeking affirmance; they are attacking that portion of the judgment of the Court below which dealt with the question of juris-

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<sup>10</sup>Sec. 43-3-22 ACLA 1949. Petitioners' opening brief, Appendix, pp. x-xii.

<sup>11</sup>*United States v. Carignan*, 342 US 36, 38, 96 L ed 48, 51 (1951).

diction of the Alaska Industrial Board. They are doing this with a view toward enlarging their rights and lessening the rights of petitioners. The rule is settled that this will not be permitted:

“A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him.”<sup>12</sup>

Consequently, the arguments made by respondents in the second principal part of their brief<sup>13</sup> should not be considered here.

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<sup>12</sup>*Letulle v. Scofield*, 308 US 415, 421-422, 84 L ed 355, 360-361 (1940). See also: *Federal Trade Commission v. Pacific States P. T. Association*, 273 US 52, 66, 71 L ed 534, 539-540 (1927); *Morley Construction Company v. Maryland Casualty Company*, 300 US 185, 191-192, 81 L ed 593, 597-598 (1937).

<sup>13</sup>Respondents' brief, pp. 20-32.

**CONCLUSION.**

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals, and that of the District Court, should be reversed; and the case remanded to the Alaska Industrial Board for the purpose of awarding further compensation to petitioner, Carl E. Jenkins.

Dated, Juneau, Alaska,  
January 3, 1958.

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Attorney General of Alaska,  
*Counsel for Petitioner Alaska  
Industrial Board.*

JOHN H. DIMOND,  
*Counsel for Petitioner  
Carl E. Jenkins.*

**(Appendix Follows.)**

# APPENDIX

**Appendix.**

## Appendix

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### ALASKA WORKMEN'S COMPENSATION ACT.

Sections 43-3-1 et seq., Alaska Compiled Laws Annotated, 1949.

Section 43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time. If an injured employee [is] entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part of subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and, on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid except that an award or order increasing the compensation rate may be made effective from date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in

excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury.